No. 06-1617

IN THE

Supreme Court of the United States

JAMES G. GILLES,

Petitioner,

v.

BRYAN K. BLANCHARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

DANIEL L. SIEWERS
Counsel of Record
BRENT STUCKEY
HART BELL, LLC
513 Main Street
P.O. Box 979
Vincennes, IN 47591
(812) 882-8935

Attorneys for Respondents

210219

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner presented compelling reasons to grant the Petition when this Court has provided clear guidance on the forum classification analysis of public property and the circuits have consistently classified property based on the characteristics of the property?

II. Whether Petitioner presented compelling reasons to grant the Petition when the Seventh Circuit held that uninvited persons had not been permitted to use the library lawn for public speaking, that no forum had been opened, and that the University's solicitation policy was therefore not germane to deciding the case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are Petitioner, James G. Gilles, and Respondents, Bryan K. Blanchard, in his official capacity of President of Vincennes University, and John Livers, individually and in his official capacity as Dean of Students for Vincennes University. The Respondents are natural persons. Vincennes University is a public, state supported university created by the Indiana State Legislature. *See* Ind. Code § 23-13-18-1, *et seq.*

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding and Rule 29.6 Statement ... ii

Table of Contents iii

Table of Cited Authorities v

Statement of the Case 1

I. Statement of Facts 1

II. Course of Proceedings 2

Reasons for Denying the Petition 6

I. This Court has provided clear guidance regarding the application of forum analysis to public properties and there is no conflict among the Circuit Courts regarding the application of forum analysis to open areas on public university campuses. 6

A. The Seventh Circuit conducted forum analysis. 6

B. The Seventh Circuit followed this Court's clear guidance regarding the application of forum analysis principles to open areas on public university campuses. 8

Contents

Page

C. No Circuit Court has held that an open area located within a public university campus is a traditional public forum. . . . 11

D. The Seventh Circuit's decision does not conflict with decisions of this Court. . . 15

II. The solicitation policy does not permit discretion related to speech on the library lawn. 17

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

ACLU Student Chapter Univ. of Md., College Park v. Mote, 321 F. Supp. 2d 670 (D. Md. 2004) 12

ACLU of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003) 6, 7

Adderly v. Florida, 385 U.S. 39 (1966) 10, 11, 16

Alabama Student Party v. Student Gov't. Ass'n., 867 F.2d 1344 (11th Cir. 1989) 10, 11

American Civil Liberties Union v. Mote, 423 F.3d 438 (4th Cir. 2005) 5, 6, 11, 13

Arkansas Educ. TV Comm'n. v. Forbes, 523 U.S. 666 (1998) 3, 8, 11

Atlanta Journal and Constitution v. City of Atlanta Dep't. of Aviation, 322 F.3d 1298 (11th Cir. 2003) 19

Bowman v. White, 444 F.3d 967 (8th Cir. 2006) 9, 11, 12, 13, 14

Brister v. Faulkner, 214 F.3d 675 (5th Cir. 2000), *cert denied*, 531 U.S. 985 (2000) 14, 15

Cited Authorities

Page

Child Evangelism Fellowship of MD v. Montgomery County Pub. Sch., 457 F.3d 376 (4th Cir. 2006) 19

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) 5, 8, 14, 16, 17

First Unitarian Church v. Salt Lake City, 308 F.3d 1114 (10th Cir. 2002) 6, 7

Greer v. Spock, 424 U.S. 828 (1976) 5, 10, 11, 16

Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 947 (2002) 19

Hayes County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert denied*, 506 U.S. 1087 (1993) 10, 11, 13, 14

Healy v. James, 408 U.S. 169 (U.S. 1972) 9

Int'l. Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 11

Justice for All v. Faulkner, 410 F.3d 760 (5th Cir. 2005) 11, 14

Cited Authorities

Page

Lakewood v. Plain Dealer Publ'g. Co.,
486 U.S. 750 (1988) 17, 19

Lederman v. United States,
291 F.3d 36 (D.C. Cir. 2002) 6, 7

Lewis v. Wilson,
253 F.3d 1077 (8th Cir. 2001) 19

Lloyd Corp. v. Tanner,
47 U.S. 551 (1972) 16

Nat'l. Endowment for the Arts v. Finley,
424 U.S. 569 (1998) 16

Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.,
460 U.S. 37 (1983) 3, 8, 17

Ridley v. Massachusetts Bay Transp. Auth.,
390 F.3d 65 (1st Cir. 2004) 19

Rosenburger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) 5

United States v. Grace,
461 U.S. 171 (1983) 10, 11, 12, 13, 15

United States v. Kokinda,
497 U.S. 720 (1990) 10, 11

Cited Authorities

Page

United States v. American Library Ass'n. Inc.,
539 U.S. 194 (2003) 16

U.S. Postal Service v.
Council of Greenburg Civic Assns.,
453 U.S. 114 (1981) 17

Widmar v. Vincent,
454 U.S. 263 (1981) .....*passim*

Statute:

Ind. Code § 23-13-18-1, *et seq.* ii

STATEMENT OF THE CASE

I. Statement of Facts

Vincennes University is a public institution with 5,000 students at its main campus in Vincennes, Indiana, a town of 18,000. (Pet. App. at 1a).[1] James G. Gilles ("Gilles") is an itinerant preacher who came to the University campus, uninvited, and attempted to preach on a lawn in the middle of campus next to the library. (Pet. App. at 1a-4a). The library

---

1. Petitioner provides this Court with extensive "facts" in his Statement of the Case. Many of the facts provided are immaterial to the consideration of the questions presented for review and other facts are misstated. Gilles fails to point out in his Statement of Facts that the Seventh Circuit determined all of the speech activities by outside groups and individuals, except that of the Duncans in 1998, were by invitation from members of the University community. (Pet. App. at 9a). The claim Gilles was forced to speak on the brick walkway in front of the Student Union rather than the library lawn because Livers declared his speech to be solicitation is a misstatement as the library lawn was never opened as a forum to him as discussed by the Seventh Circuit and in the body of this Response. Consequently, whether Gilles' speech was classified as solicitation or not, it was not permitted on the library lawn. The claim by Gilles that he spoke on the library lawn in 2001 without interruption is a misstatement as he was asked to leave. (Pet. App. at 2a). The claim that other speakers whose speech falls within the policy's definition of "solicitation" are permitted to speak places other than the brick walkway is a misstatement as it fails to recognize that all such persons are members of the campus community or their invitees. The claims that Gilles did not try to entice anyone to action and that the designated area is not suitable for Gilles' expressive activity are argumentative. Respondents have limited their Statement of Facts to those that are material in light of the Seventh Circuit's decision. Respondent's Statement of Facts relies upon the District Court and the Seventh Circuit's recitation of facts.

lawn is not contingent to any public street or sidewalk. (Pet. App. at 18a). Gilles was told he could preach only on a brick walkway in front of the Student Union. (Pet. App. at 3a-4a). Gilles preached on the brick walkway, but he found it not to his liking and filed suit. (Pet. App. at 4a, 15a).

The University Solicitation Policy limited solicitation to a brick walkway in front of the Student Union. (Pet. App. at 3a). Uninvited outsiders are permitted to solicit only on the student union walkway. (Pet. App. at 15a). In contrast, outside speakers invited by members of the university community may use university facilities including the library lawn. (Pet. App. at 10a-11a).

Gilles failed to present evidence that the library lawn has been traditionally devoted to or set aside for expressive use by the general public or otherwise purposely dedicated for such purposes. (Pet. App. at 9a-10a; 18a.). The Seventh Circuit reviewed Gilles' evidence regarding prior use of the library lawn and found that all the expressive activities by outsiders that had taken place on campus were conducted at the invitation of a member of the Vincennes University community except for one occurrence in 1998. (Pet. App. at 9a-11a).

II. Course of Proceedings

The District Court entered summary judgment in favor of the Respondents and against the Petitioner. (Pet. App. at 14a). The District Court first noted that a determination had to be made regarding the nature of Gilles' preferred venue as that determination determined the applicable level of scrutiny. (Pet. App. at 17a-18a). The District Court reviewed the three main types of forums identified by this Court being the

traditional public forum, the designated public forum, and the non-public forum. (Pet. App. at 18a) (citing *Arkansas Educ. TV Comm'n. v. Forbes*, 523 U.S. 666, 677 (1998)). Next, the District Court explained that "traditional public fora are defined by the objective characteristics of the property, such as whether 'by long traditional or by government fiat,' the property has been 'devoted to assembly and debate,'" and further explained that designated public fora are created "by purposeful government action to open the area for expressive activity." (Pet. App. at 18a) (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983)).

After this review, the District Court found that there was no evidence that the library lawn has "by long tradition or fiat been devoted to or set aside for expressive use by the general public," and it further found that there was no evidence Vincennes University purposely dedicated the area for expressive use by the general public. (*Id.*). As a result, the district court concluded that the subject area was not a public space "as it relates to Gilles, an outsider to the campus and its community." (*Id.*).

Given its forum determination, the District Court proceeded to analyze the solicitation policy pursuant to the non-public forum standard and concluded that the policy was viewpoint neutral, reasonable, and tailored to accomplish the University's educational mission. (Pet. App. at 19a-20a) (citing *Perry*, 460 U.S. at 46 (1983)). Notably, as discussed below, the District Court quoted *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) just like nearly all, if not all, courts that have determined the forum classification of an area on a public university campus. The District Court also pointed out that the policy "does not prohibit any speech at all but instead merely invites all to whom it applied to solicit in the same designated area." (Pet. App. at 19a).

The District Court indicated that "it is difficult to accept Gilles' insistence that the Policy does not apply to him given that the circumstances of his visit and his stated purpose are to speak to students on moral topics and behaviors with the hope that they will embrace his religious faith." (Pet. App. at 19a). The District Court specifically considered Gilles' "due process concerns" and found that the Policy was "neither vague nor ambiguous." (Pet. App. at 20a n.1). The District Court further found that the Policy did not vest the Dean of Students with any discretion but simply required him to approve the date and time for the solicitation. (See *id.*).

Gilles appealed the District Court's entry of summary judgment, and the United States Court of Appeals for the Seventh Circuit affirmed the District Court. (Pet. App. at 1a-13a). The Seventh Circuit clearly identified the library lawn as a non-public forum as to Gilles, comparing it to the large auditorium at the Justice Department in Washington. (Pet. App. at 5a). In fact, nearly the entire opinion sought to determine whether the University had opened the library lawn to expression by uninvited visitors to the University. (Pet. App. at 6a-11a). The Seventh Circuit ultimately acknowledged the library lawn was a "limited designated public forum," open to expression to those in the University community and to those invited by the University community, but indicated that explicitly holding as such was unnecessary. (Pet. App. at 11a-12a).

The Seventh Circuit found that no forum had been opened because there was no evidence uninvited outsiders had been permitted to use the lawn. (Pet. App. at 8a-9a). Given this finding, the university could not have intended for the solicitation policy to open the library lawn to all outsiders who were not soliciting. (Pet. App. at 7a-9a). The

fact that the campus is not fenced and that outsiders are not forbidden to stroll on the lawn did not serve to open a forum as these persons were simply authorized to unobtrusively use the property as a short cut or other pathway and are "classic licensees." (*Id.*). Since no forum had been opened, the University was free to bar access to the lawn to outsiders just as the university could bar outsiders from other portions of its property as "[t]he government 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,' (*Greer v. Spock*, 424 U.S. 828, 836 (1976)," (Pet. App. at 5a) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

Importantly, just like the District Court, the Seventh Circuit noted that courts reject the proposition "that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings." (*Id.*) (quoting *Widmar*, 454 U.S. at 268 n.5). The Seventh Circuit acknowledged that a university could not engage in viewpoint discrimination and open its spaces to be used by some outsiders but exclude others because it disapproves of their message, but it explained that a university can use neutral criteria such as that outsiders must be invited to speak on the campus by a faculty member or a student group. (Pet. App. at 6a) (citing *Rosenburger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-830 (1995); *American Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005)). The Seventh Circuit noted that the difference between invited and uninvited visitors is fundamental to a system of property rights and that the invitation of other civilian speakers and entertainment to Fort Dix did not convert Fort Dix into a public forum or confer upon political candidates the constitutional right to conduct campaigns there. (*Id.*) (quoting *Greer*, 424 at 838 n.10 (1976).

In conclusion, the Seventh Circuit found that the limits Vincennes University placed on the use of the library lawn "are consistent with limiting University facilities to activities that further the interest of the University community" and as a result "[t]he limits are constitutional." (Pet. App. at 11a).

REASONS FOR DENYING THE PETITION

I. This Court has provided clear guidance regarding the application of forum analysis to public properties and there is no conflict among the Circuit Courts regarding the application of forum analysis to open areas on public university campuses.

A. The Seventh Circuit conducted forum analysis.

The Petitioner strains to show a conflict between the Seventh Circuit's decision below and decisions from other circuits. In doing so, the Petitioner cites to various cases discussing the factors to be considered in performing forum analysis and implies that just because the Seventh Circuit in this case and the Fourth Circuit in *Mote*, 423 F.3d at 444, determined that an open area on a public university campus was a non-public forum with respect to outsiders that these circuits somehow failed to consider the property's physical and objective characteristics. (Pet. App. at 13a) (citing *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003); *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114, 1125-26 (10th Cir. 2002); and *Lederman v. United States*, 291 F.3d 36, 41-44 (D.C. Cir. 2002)). In effect, the Petitioner is arguing that the Seventh Circuit could not have considered the objective characteristics of the property since the conclusion reached was different than the Petitioner wanted.

In fact, the Seventh Circuit's decision was based entirely on forum analysis and its determination that the library lawn is part of a university campus which has not been opened for speech activities by non-members of the campus community. (Pet. App. at 5a, 9a-11a). The Seventh Circuit in fact considered "(1) the actual use and purposes of the property . . . , (2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area . . . , and (3) traditional or historic use of both the property in question and other similar properties." *City of Las Vegas*, 333 F.3d at 1100-1101.

The cases cited by Gilles are clearly distinguishable on their facts. *First Unitarian Church*, 308 F.3d at 1126, and *City of Las Vegas*, 333 F.3d at 1102, dealt with government properties constituting public thoroughfares, and *Lederman*, 291 F.3d at 41-42, dealt with a sidewalk located on the grounds of the U.S. Capitol which are a traditional public forum as a seat of government. When the classification of open areas on public university campuses is examined, it becomes completely clear that this Court has provided clear guidance and that there is no conflict among the circuits.[2]

---

2. In a footnote to the Petition, the Petitioner claims that the Seventh Circuit refused to consider the particular access sought by the speaker. (Pet. p. 12 n.4). The Seventh Circuit certainly made no mistake about where Gilles wanted to speak. It clearly discussed the library lawn rather than other parts of the campus. The Seventh Circuit did not discuss the classification of all portions of the campus as to all persons as implied by Gilles. It simply determined that the library lawn was a non-public forum as to Gilles.

B. The Seventh Circuit followed this Court's clear guidance regarding the application of forum analysis principles to open areas on public university campuses.

This Court has provided extensive guidance on the forum classification of public property for First Amendment purposes. *See Arkansas Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 677 (1998); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802, 806 (1985); *Perry Educ. Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37, 45-46 (1983); *e.g.* Certainly, this Court cannot provide specific guidance with respect to each unique piece of public property. The Seventh Circuit's decision in this case does not conflict with the guidance of this Court. Throughout this case and in his Petition, Gilles has continually refused to acknowledge that a university campus is objectively different and serves a different purpose than a public sidewalk or a public park. In contrast, this Court has recognized the unique characteristics of a university campus stating as follows:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

Widmar, 454 U.S. at 267 n.5. Even with respect to students and members of the campus community, *Widmar* goes on to

affirm the validity of cases such as *Healy v. James*, 408 U.S. 169, 188-189 (U.S. 1972), "that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277. As a result, a university can impose "reasonable regulations compatible with [its] mission" of education such as denying access to non-students. *Id.* at 267 n.5.

Gilles wants to explain away *Widmar* by focusing on the last sentence in footnote 5 and the use of the word "all" claiming that this Court implicitly recognized Gilles' right to have access to at least "some" university property. Vincennes University in fact did permit Gilles access to some of its property as it permitted Gilles to preach on the brick walkway in front of the Student Union where he would encounter a steady stream of students. (Pet. App. at 3a-4a, 7a). Nevertheless, the clear meaning of the last sentence in footnote 5 is simply that a university is entitled to reasonably control its property. The last sentence in footnote 5 does not impact the clear indication that university property is to be treated differently than streets or parks.

The Circuit Courts have not misunderstood the clear direction of *Widmar* as none has held that an open area on a university campus is a traditional public forum when that area can be distinguished from a municipal sidewalk. *See* (Pet. App. at 5a) (quoting *Widmar*, 454 U.S. at 268 n.5); *Mote*, 423 F.3d at 443 (quoting *Widmar*, 454 U.S. at 267 n.5 and recognizing that "a university differs in significant respects from public forums such as streets or parks or even municipal theaters"); *Bowman v. White*, 444 F.3d 967, 978 (8th Cir. 2006) (quoting *Widmar*, 454 U.S. at 268 n.5 and recognizing that "[a] university differs in significant respects from public forums such as streets or

parks or even municipal theaters."); *Alabama Student Party v. Student Gov't. Ass'n.*, 867 F.2d 1344, 1354 n.5 (11th Cir. 1989) (Tjoflat, J., dissenting) (quoting *Widmar*, 454 U.S. at 268 n.5 and discussing footnote 5 in depth after a determination that the campus fell within the "limited public forum" category of government property); *Hayes County Guardian v. Supple*, 969 F.2d 111, 116-117 (5th Cir. 1992), *cert denied*, 506 U.S. 1087 (1993) (quoting *Widmar*, 454 U.S. at 267 n.5 and holding the that subject areas were designated public fora for the speech of students).

Widmar's direction that the open areas of university campuses are not traditional public forums is consistent with this Court's prior decisions. In *Greer v. Spock*, 424 U.S. 828, 836-838, 838 n.10 (1976), this Court held that Fort Dix did not become a public forum because the public was permitted to freely visit Fort Dix and civilian speakers and entertainers had been invited to appear at Fort Dix.[3] Also, in *Adderly v. Florida*, 385 U.S. 39, 47 (1966) this Court held that the open grounds surrounding a jail were not a public forum.

Subsequent opinions of this Court reinforce *Widmar*. *United States v. Grace*, 461 U.S. 171, 180 (1983), instructs that streets and sidewalks located within "some special type of enclave" such as a university are not traditional public forums. Justice Kennedy's controlling concurrence in *United States v. Kokinda*, 497 U.S. 720, 730, 738 (1990), does not call *Widmar* into question. His concurrence held that a sidewalk leading to the entrance of a post office was "more than a non-public forum" as a result of "the wide range of

3. Similarly, as the Seventh Circuit recognized, the library lawn did not become a public forum because the public was allowed to visit or because speakers and entertainers were invited by members of the campus community.

activity" that the government had permitted to take place on the sidewalk as individuals and groups had been permitted to "leaflet, speak, and picket" on the postal premises. Gilles' claim that *Kokinda* held that the sidewalk was a traditional public forum is simply incorrect. *Kokinda* does not conflict with the decision of the Seventh Circuit below as there was no evidence of customary use of the library lawn by the general public for First Amendment activities.

Finally, this Court "has rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, 523 U.S. at 678 (citing *Int'l. Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-681 (1992). Taken together, *Widmar*, *Greer*, *Adderly*, *Grace*, *Kokinda*, and *Forbes* conclusively establish that the open areas of a public university are not traditional public fora.

C. No Circuit Court has held that an open area located within a public university campus is a traditional public forum.

All circuits that have considered the forum classification of an open area on a public university campus, which can be distinguished from a municipal sidewalk, have determined the area was either a designated public forum or a non-public forum depending on the relevant facts regarding past access provided to the property and the identity of the speaker. *See Bowman*, 444 F.3d at 977-980; *Hayes County*, 969 F.2d at 118, *Mote*, 423 F.3d at 444; *Alabama Student Party*, 867 F.2d at 1354; *Justice for All v. Faulkner*, 410 F.3d 760, 767-770 (5th Cir. 2005).

The only case discussed in detail by the Petitioner is *Bowman*, 444 F.3d at 978-980. In that case, the plaintiff was

represented by the same counsel as Gilles in this case. *See id.* at 972. In *Bowman*, the Eighth Circuit held that three open areas on the campus of the University of Arkansas were designated public forums as a result of how the university had treated the areas especially the fact that the policy governing the use of university outdoor space permitted speech by both university and non-university entities. *See id.* at 978-980. The policy itself offered strong evidence that the university intentionally opened the area as a designated public forum. *See id.* at 978.

Importantly, prior to reaching its conclusion, the Eighth Circuit stated that even though the University "'possesses many of the characteristics of a public forum' such as open sidewalks, '[it] differs in significant respects from public forums such as streets or parks or even municipal theaters.'" *Id.*. (quoting *Widmar*, 454 U.S. at 268 n.5). The Eighth Circuit indicated that the significant difference between a traditional public forum and a university campus results from the fact that "a university's purpose, its traditional use, and the government's intent with respect to the property is quite different because a university's function is not to provide a forum for all persons to "talk about all topics at all times." *Id.* Instead, a university's mission is education and to act as a "'special type of enclave' devoted to higher education." *Id.* (quoting *ACLU Student Chapter Univ. of Md., College Park v. Mote*, 321 F. Supp. 2d 670, 679 (D. Md. 2004) which was quoting *Grace*, 461 U.S. at 180; citing *Widmar*, 454 U.S. at 268 n.5). As a result, open areas "that might otherwise be traditional public fora" are not when they are within the boundaries of a university's campus. *Id.*

As a result, the "particularly striking," (Pet. at p. 16), conflict between the decision of the Seventh Circuit in this case and that of the Eighth Circuit in *Bowman* is actually non-existent. In fact, the cases are strikingly consistent except for the fact that in *Bowman* the University of Arkansas had intentionally opened the subject areas for public discourse. Therefore, the Seventh Circuit did not in fact take "a divergent path." (Pet. at p. 16).[4]

Similarly to *Bowman*, the Fourth Circuit in *Mote*, 423 at 44, determined that the University of Maryland campus "is not akin to a public street, park or theater, but instead is an institute of higher learning that is devoted to its mission of public education." The mission of the university "necessarily focuses on the students and other members of the university community," so as a result, the campus has not "traditionally been open to the public at large, but instead has been a 'special type of enclave' that is devoted to higher education." *Id.* (quoting *Grace*, 461 U.S. at 180). *Mote* specifically noted that there was nothing in the record to indicate that prior to the implementation of the challenged policy which limited outside unsponsored persons and groups to two designated areas on campus that "the campus was anything but a non-public forum for members of the public not associated with the university." *Id.* at 444.

The Fifth Circuit, in *Hayes County*, 969 F.2d at 116, also consistently held that the outdoor grounds of the campus such as the sidewalks and plazas of Southwest Texas State

---

4. The portion of the *Bowman* decision questioned by the Seventh Circuit was the holding that the university could not limit use of the campus by outsiders to five days once the university allowed anyone to use its outdoor spaces rather than the forum analysis itself. (Pet. App. at 7a).

University were designated public fora for the speech of university students. In that case, the university had adopted a specific policy opening the university grounds to both students and non-students alike. *See Hayes*, 969 F.2d at 117. As a result, Southwest Texas State University took action to create a designated public forum.[5]

In contrast to the universities in *Bowman* and *Hayes County*, Vincennes University did not open the library lawn to non-students who had not been invited by a member of the campus community. A designated forum is created "only by intentionally opening a non-traditional public forum for public discourse." *Forbes*, 523 U.S. at 677 (quoting *Cornelius*, 473 U.S. at 802). A designated public forum is not created through inaction or by permitting limited discourse. *See id.*

The only case which has determined that property of a public university was a traditional public forum is *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000), (*cert denied*, 531 U.S. 985 (2000). That case is clearly distinguishable as it dealt with university property adjacent to a city sidewalk and along a city street which is "a unique piece of university property that is, for all constitutional purposes, indistinguishable from the Austin city sidewalk." *Id.* at 683. *Brister* explained that "there is no indication or physical demarcation of the public

5. The Fifth Circuit reached a nearly identical holding in *Justice for All*, 410 F.3d at 767-770, where it held that the outdoor open areas of the University of Texas at Austin were a designated forum for student expression. In that case, the University had adopted "Institutional Rules" which evidenced clear intent to create such a forum. *See id.* at 770. Whether the University had opened its entire campus to "unfettered expression by the general public" was not before the Court. *Id.* at 767.

sidewalk, which is a public forum, and *the university grounds, which typically are not.*" *Id.* at 682 (emphasis added). The facts in *Brister* were quite similar to the facts presented in *Grace*, 461 U.S. 171 (1983), which dealt with sidewalks surrounding the grounds of this Court which were indistinguishable from the sidewalks of Washington, D.C., and *Brister* heavily relied on *Grace*. In contrast, the library lawn is in the middle of campus next to the university library and is not contingent to any public street or sidewalk. (Pet. App. at 2a, 18a).

As a result, there is uniformity in the treatment of open areas on university campuses by the Circuit Courts. No circuit has held that an open area of a campus distinguishable from a city sidewalk is a traditional public forum. The Circuit Courts have consistently applied the facts to the forum analysis principles provided by this Court to determine if a designated public forum has been opened and if so for whom. All circuits have classified open areas on university campuses as a general designated public forum, a limited public forum for student expression, or a non-public forum depending on the facts. This uniformity results from the clear guidance of this Court.

D. The Seventh Circuit's decision does not conflict with decisions of this Court.

Gilles attempts to manufacture several conflicts between the Seventh Circuit's decision and decisions of this Court, but none in fact exist. Gilles suggests that the Seventh Circuit entirely disregarded forum analysis and applied private property rules in its place. The Seventh Circuit's decision is actually based entirely on forum analysis and holds that the library lawn, on the facts presented, is not a traditional public forum or a designed public forum for use by the general

public. Once that determination was made, the Seventh Circuit simply pointed out this Court's repeated indication that the government "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (Pet. App. at 5a), (quoting *Greer*, 424 U.S. at 836; *Cornelius*, 473 U.S. at 800; *Adderly*, 385 U.S. at 47). The Seventh Circuit certainly does not suggest that the government can bar public speaking from traditional public forums as suggested by Gilles. (Pet. at p. 20).[6] Regardless, this Court has indicated that forum principles "are out of place" in certain circumstances which involve neither a "traditional" nor a "designated" public forum. *United States v. American Library Ass'n. Inc.*, 539 U.S. 194, 205 (2003); *Accord Nat'l. Endowment for the Arts v. Finley*, 424 U.S. 569 (1998).

Gilles incorrectly argues "the rules for private property cannot be applied to public property." (Pet. at p. 19) (citing *Lloyd Corp. v. Tanner*, 47 U.S. 551, 563 (1972)). *Lloyd Corp.* stands for no such proposition and simply held that First Amendment rights did not extend to private property open to the public. *See id.* at 570. Countless if not all rules for private property apply to public property which has not been opened as a public forum, and many of the rules for private property apply to all public property. Gilles' proposition would effectively mean that public property could not be controlled, developed, or transferred.

---

6. The Seventh Circuit also did not suggest that the Constitution does not fully apply to public universities as suggested by Gilles. (Pet. p. 10 n.3). Rather, the Seventh Circuit only noted that the Constitution did not require public universities to bear extravagant burdens (not required of private universities) *just because* they have taxpayer support as a way of evening things out. (Pet. App. at 5a). (emphasis added).

Because Vincennes University's solicitation policy did not open the library lawn as a forum and because Gilles "failed to show that any uninvited outsider has ever been permitted to use the lawn for any purpose," (Pet. App. at 9a), the Seventh Circuit considered common law property rules. As previously discussed, a public forum cannot be created by "inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 46). Gilles has no inherent First Amendment Right to engage in speech activities on the library lawn as "the First Amendment does not guarantee access to property simply because it is owned and controlled by the government." *Cornelius*, 473 U.S. at 803 (quoting *U.S. Postal Service v. Council of Greenburg Civic Assns.*, 453 U.S. 114, 129 (1981)). Certainly, government property which is a non-public forum does not become a public forum open to all expressive conduct simply because of the lack of a written policy.

II. The solicitation policy does not permit discretion related to speech on the library lawn.

Gilles devotes a significant portion of his Petition to discussion of the "unbridled discretion" doctrine. (Pet. at p. 20-29). This term was used in *Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 763 (1988), to describe the discretion given to a government official who decides "who may speak and who may not" based on content or viewpoint without "standards governing the exercise of discretion." *Id.* at 763-764. Importantly, in entering into this discussion *Lakewood* was discussing "a law or policy permitting communication in a certain manner for some but not for others." *Id.* at 763. In other words, once the government, by

law or policy, opens a public forum to communication, government officials cannot have unbridled discretion in determining who may speak and who may not.

The Seventh Circuit determined that the solicitation policy did not in fact apply to speech on the library lawn. Because no uninvited outsiders had been permitted to speak on the library lawn and no forum had been opened, there was no discretion to be exercised. The Seventh Circuit determined that the only relevance of the solicitation policy to this case was whether by promulgating the policy, the university intended to throw open the library lawn to all uninvited outsiders who were not soliciting. (Pet. App. at 7a-8a). The solicitation policy became irrelevant when the Seventh Circuit, using the required forum analysis, determined that the library lawn had not been opened to uninvited outsiders. The solicitation policy certainly "opened" the designated area in front of the Student Union to solicitation by the general public. If Gilles had been denied access to the designated area because his speech was determined not to be solicitation, the language of the policy would be critical, but Gilles brought suit claiming a right to speak on the library lawn rather than claiming his rights were violated in some way with respect to the designated area.

As a result, the Seventh Circuit did not require Gilles to show "further proof of viewpoint discrimination" as he claims. (Pet. at p. 23). Rather, the Seventh Circuit required Gilles to provide some evidence that the library lawn had been opened to uninvited outsiders. (Pet. App. at 9a). The Seventh Circuit did not permit a vague policy to be bolstered by unwritten terms and an assumption of good faith by public officials. Rather, the Seventh Circuit found that Vincennes University took no action to open the library lawn to

expression by uninvited members of the general public and that, as a result, Gilles, just like other uninvited members of the general public, was not entitled to speak on the library lawn.

Accordingly, the unbridled discretion doctrine is completely inapplicable to this case. Nevertheless the conflict between the circuits suggested by Gilles is not present. Some circuit courts have applied the doctrine to strike down laws or policies applicable to non-public fora. *See Child Evangelism Fellowship of MD v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006); *Atlanta Journal and Constitution v. City of Atlanta Dep't. of Aviation*, 322 F.3d 1298, 1310-11 (11th Cir. 2003); and *Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001). But, the lack of the doctrine's application by the Federal Circuit in *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (1st Cir. 2004), *cert. denied*, 537 U.S. 947 (2002), and the First Circuit in *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 94-95 (Fed. Cir. 2002), does not create a split in the circuits as these courts did not indicate that the doctrine is always inapplicable in a non-public forum. A closer analysis shows that the doctrine was not applied in these cases because the "threats to expression identified by *Lakewood*" were not present. *Griffin*, 288 F.3d at 1324; *see Ridley*, 390 F.3d at 94. In fact, *Child Evangelism*, 457 F.3d at 377, approvingly quotes *Ridley*, 390 F.3d at 94-95 and approvingly cites to *Griffin*, 288 F.3d at 1324. As a result, there is no "obvious circuit split" as claimed by Gilles.

Nevertheless, the simple fact is that the solicitation policy was not "a law or policy permitting communication" on the library lawn. *Lakewood*, 486 U.S. at 763.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

DANIEL L. SIEWERS
Counsel of Record
BRENT STUCKEY
HART BELL, LLC
513 Main Street
P.O. Box 979
Vincennes, IN 47591
(812) 882-8935

Attorneys for Respondents